93-86

No. 93-___

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

OREL PARKINS,

Petitioner,

v.

MOBAY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM TINKLER, JR.
(Counsel of Record)
TINKLER & GROFF
One Decatur Towncenter
Suite 230
Decatur, Georgia 30030-2553
(404) 371-8662

WILLIAM P. KEENAN
WILLIAM P. KEENAN, P.C.
One Buckhead Plaza, Suite 1010
3060 Peachtree Road, N.W.
Atlanta, Georgia 30305
(404) 266-8023

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED[1]

Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling or packaging of pesticides.

---

[1] Petitioner, Orel Parkins, appeared as Plaintiff/Appellant below. Respondent, Mobay Corporation, appeared as Defendant/Appellee below. National Agricultural Chemicals Association and Responsible Industry for a Sound Environment appeared as *amicus curiae* in support of respondent.

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OPINION BELOW

The unpublished opinion of the Court of Appeals is cited at 988 F.2d 1218 (11th Cir. 1993) and is reproduced in the petitioner's appendix (Pet.App.) at 1a. The judgment is reproduced at Pet.App. 3a. The decision of the District Court, filed February 11, 1992, is unreported and is reproduced at Pet.App. 5a. The judgment of the district court, entered February 11, 1992, is reproduced at Pet.App. 8a.

JURISDICTION

This Court has jurisdiction on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

§ 136v. Authority of States

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

§ 136(p) Label and labeling. –

(1) Label. – The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. – The term "labeling" means all labels and all other written, printed, or graphic matter –

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculature and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

Petitioner, Orel Parkins, individually and as administrator of the estate of Samuel Clyde Parkins, deceased, initiated separate actions in the superior court of Fulton County, Georgia against respondent, Mobay Corporation, manufacturer of the pesticide Di-Syston, seeking damages under Georgia law for wrongful death, conscious pain and suffering, funeral expenses and punitive damages. The actions were removed by respondent, Mobay Corporation, to the district court and, upon motion by petitioner, were consolidated for all purposes.

Plaintiff's decedent, Samuel Clyde Parkins, died after working several weeks for Twitty Pecan Company in Dougherty County, Georgia. For seven to ten days prior to his death on November 4, 1987, petitioner's decedent had worked exclusively in "Field 3 North", harvesting pecans on a pecan shaking machine. As late as August 24, 1987, this field had been sprayed with Di-Syston, a highly toxic pesticide manufactured by respondent, Mobay Corporation. Di-Syston is Mobay Corporation's trade name for disulfaton, an organo-phosphate pesticide compound which causes death by inhibiting the action of cholesterinase, an enzyme controlling the nervous system.

The certificate of death on Samuel Clyde Parkins shows that his death was caused by disulfaton intoxication. A post-mortem examination by the Georgia Bureau of Investigation revealed the presence of toxic levels of disulfaton and demeton-S, a metabolite of disulfaton, in Mr. Parkins' blood.

Although respondent, Mobay Corporation's, Di-Syston label contained certain warnings purportedly designed to acquaint the user with the risks associated with the product's use, the label failed to warn users that Di-Syston exposure may cause human death, failed to warn that the metabolities of Di-Syston are progressively more toxic than the parent compound and failed to warn of risks associated with the decedent's gradual, as opposed to acute, exposure to the pesticide. Moreover, the label implied that safe harvesting of pecans could occur within 30 days of the pesticide's use when, in fact, Mobay Corporation's in-house studies reveal that the product's toxic half-life may be as great as 40 to 100 days.

Without addressing the merits, the district court and the court of appeals dismissed all of the petitioner's claims on the ground that they were preempted by FIFRA. This case presents the same legal questions as are before this Court in *Papas v. Zoecon Corporation*, No. 92-1938, filed June 7, 1993, which was decided by the Eleventh Circuit on March 8, 1993. Indeed, the Court of Appeals' decision expressly cites *Papas* as controlling in the present case.

Given the identity of the two cases, petitioner does not reiterate in full the argument set forth in the petition in *Papas*, but only asks that this Court dispose of this petition in a manner consistent with *Papas*. Thus, if the Court grants certiorari in *Papas*, as we believe it should, the Court should either hold in abeyance this petition pending the disposition of *Papas* or grant certiorari here and consolidate the two cases for plenary review. If certiorari is denied in *Papas*, then it should be denied here as well.

However, as fully described in the *Papas* petition, certiorari should not be denied because there is a deep difference of opinion among the lower courts concerning FIFRA preemption and the Eleventh Circuit's reasoning on this issue is flawed, resulting in the incorrect decision of an important federal question.

CONCLUSION

The petition for a writ of certiorari should be disposed of in a manner consistent with the Court's disposition of the petition in *Papas v. Zoecon Corporation*, No. 92-1938 (filed June 7, 1993).

Respectfully submitted,

WILLIAM TINKLER, JR.
(Counsel of Record)
TINKLER & GROFF
One Decatur Towncenter
Suite 230
Decatur, Georgia 30030-2553
(404) 371-8662

WILLIAM P. KEENAN
WILLIAM P. KEENAN, P.C.
One Buckhead Plaza, Suite 1010
3060 Peachtree Road, N.W.
Atlanta, Georgia 30305
(404) 266-8023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8203

D C. Docket Nos. 1:89-CV-2471 & 1:89-CV-2472

OREL PARKINS, as Administrator of the Estate of Samuel Clyde Parkins, deceased,

Plaintiff-Appellant,

versus

MOBAY CORPORATION, a New Jersey Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(Filed March 9, 1993)

Before FAY and ANDERSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The claims which appellant presented to the district court are all controlled by *Papas v. The Upjohn Company*, 926 F.2d 1019 (11th Cir. 1993). Appellant's "misbranding" claim was not presented to the district court, but rather

was raised for the first time in its supplemental brief on appeal. We decline to entertain that claim.

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8203

D C. Docket Nos. 1:89-CV-2471 and
1:89-CV-2472

OREL PARKINS, as Administrator of the Estate of Samuel Clyde Parkins, deceased,

Plaintiff-Appellant,

versus

MOBAY CORPORATION, a New Jersey Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(Filed March 9, 1993)

Before FAY and ANDERSON, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that the plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 9, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen Illegible
Deputy Clerk

ISSUED AS MANDATE: APR. 09, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OREL PARKINS, as Administrator of the Estate of SAMUEL CLYDE PARKINS, deceased,	:	CIVIL ACTION
Plaintiff,	:	1:89-cv-2471-MHS
v.	:	
MOBAY CORPORATION, a New Jersey Corporation,	:	
Defendant	:	
OREL PARKINS, as next of kin of SAMUEL CLYDE PARKINS, deceased,	:	CIVIL ACTION
Plaintiff,	:	1:89-cv-2472-MHS
v.	:	
MOBAY CORPORATION, a New Jersey Corporation,	:	
Defendant	:	

ORDER

(Filed Feb. 11, 1992)

This matter is before the Court on defendant's motion for summary judgment. For the reasons stated briefly below, the Court will grant the motion.

In his capacity as next of kin and administrator of the estate of Samuel Clyde Parkins ("parkins"), plaintiff Orel

Parkins filed two separate actions in the Superior Court of Fulton County against defendant Mobay Corporation, manufacturer of the insecticide Di-Syston. The actions were removed to this Court and consolidated for all purposes. The Amended Complaint alleges that Parkins, while working for Twitty Pecan Company, was exposed to Di-Syston and died as a result of this exposure. The Amended Complaint further alleges that the labeling of Di-Syston was inadequate because it failed to warn of the dangers associated with the use of Di-Syston. The Amended Complaint sounds in negligence (Count I) and strict liability (Count II).[1]

Defendant argues that plaintiff's claims are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"), under which Di-Syston is registered with the Environmental Protection Agency. Defendant cites *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), in support of this position. In *Papas*, after noting that "[u]nder FIFRA, the federal government – through the EPA – has the sole and exclusive right to regulate pesticide labels," *id.* at 1024, the Court of Appeals held that "FIFRA impliedly pre-empts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling." *Id.* at 1026 (emphasis in original). Plainly, as defendant contends, *Papas* forecloses

---

[1] Defendant's motion for summary judgment was filed before the original complaint was amended – that is, before Count II was added. However, since, as noted above, both Counts I and II attack the adequacy of the labeling, defendant's motion is, in fact, directed at both counts and will be so considered by the Court.

recovery based on the claims asserted by plaintiff. Plaintiff argues, however, that *Papas* was effectively overruled by the Supreme Court in *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476 (1991). The Court disagrees. In *Mortier,* the Supreme Court merely held that FIFRA does not pre-empt regulation of the use of pesticides by local governments. The question decided by the Court of Appeals in *Papas* was not presented to or considered by the Supreme Court in *Mortier.*

Accordingly, the Court GRANTS defendant's motion for summary judgment [#19] and DENIES AS MOOT defendant's request for oral argument [#32]. The Court DIRECTS the Clerk to enter judgment in favor of defendant.

IT IS SO ORDERED, this 7th day of February, 1992.

/s/ M. H. Shoob
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

ENTERED ON DOCKET
FEB 11 1992

L.D.T., CLERK

BY:
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Orel Parkins,	:	CIVIL ACTION NOS.
Plaintiff,	:	1:89-CV-2471-MHS
vs.	:	1:89-CV-2472-MHS
Mobay Corporation,	:	
Defendant.	:	

JUDGMENT

This action having come before the court for consideration of defendant's motion for summary judgment, and the court having granted same, it is

Ordered and adjudged that the plaintiff, Orel Parkins, take nothing, that the action be dismissed, and that the defendant, Mobay Corporation, recover from the plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 11th day of February, 1992.

Luther D. Thomas, Clerk

By: /s/ Jack C. Barrs
Jack C. Barrs
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
February 11, 1992
Luther D. Thomas, Clerk

By: /s/ Jack C. Barrs
Jack C. Barrs
Deputy Clerk

(2)

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October Term, 1993

OREL PARKINS,

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v.

MOBAY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES L. MOORE
J. GREG DOW
HOLTZMAN & URQUHART
900 Two Houston Center
909 Fannin Street
Houston, Texas 77010
(713) 739-0000

Attorneys for Respondent,
Mobay Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992), which expressly prohibits the states from imposing "any requirements" for pesticide labeling or packaging "in addition to or different from those required" under FIFRA, preempts state common law failure to warn claims against pesticide manufacturers.

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MOBAY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Mobay Corporation[1] respectfully requests that this Court deny Orel Parkins' petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

[1] Mobay Corporation was merged with its affiliate Miles Inc. on January 1, 1992 with Miles Inc. being the surviving corporation. However, for purposes of clarity, Respondent will be referred to as Mobay Corporation in this brief. Bayer AG is the parent corporation of Miles Inc. The following are corporations in which Miles Inc has an ownership interest but are not wholly-owned subsidiaries: Miles Sanhyo, Miles India, Sucro Miles, and H.C. Starck.

The unpublished opinion of the court of appeals is cited at 988 F.2d 1218 (11th Cir. 1993) and is reproduced in petitioner's appendix at 1a. The judgment is reproduced in petitioner's appendix at 3a.

Procedural Background

This is a wrongful death case that was removed to the Northern District of Georgia, Atlanta Division. Petitioner Orel Parkins' causes of action in this case were for negligence and strict tort liability based upon a failure to warn and label inadequacy. The product alleged to be involved, Di-Syston 8, is a pesticide that is registered with the United States Environmental Protection Agency (EPA). It is a restricted use pesticide sold only to and applied by or under direction of certified pesticide applicators. The label on the product was approved by the EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y after review of numerous toxicology, residual effect and re-entry studies.

Mobay filed a motion for summary judgment in the trial court based upon federal preemption under 7 U.S.C. § 136v(b) of FIFRA. This section reads as follows:

> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

The trial court granted the motion for summary judgment and the United States Court of Appeals for the Eleventh Circuit affirmed the judgment on March 9, 1993, finding that *Papas v. Upjohn Company*, 926 F.2d 1019 (11th Cir.

1991) was controlling. The Eleventh Circuit in the *Parkins* case also stated that there was no misbranding claim presented to the district court and therefore that issue could not be considered on appeal.

Regulatory Background

As stated, this appeal involves the effect of the preemption provision of FIFRA. Enacted in 1947 to give the Agriculture Department regulatory authority over pesticide licensing and packaging, FIFRA was transformed in 1972 into a comprehensive regulatory statute governing the use, sale, and labeling of pesticides. As part of its comprehensive regulatory scheme, Congress expressly preempted state regulation of pesticide labeling and packaging.

The Federal Government's regulation of the manufacture, marketing and use of all pesticides sold in the United States is largely executed by the EPA, pursuant to FIFRA. The cornerstone of federal pesticide regulation is FIFRA's requirement that all pesticides sold or distributed in the United States must be registered with the Administrator of the EPA. 7 U.S.C. § 136a(a).

The labeling which accompanies a pesticide is the focus of the registration process. A manufacturer must submit proposed labeling and instructions for a pesticide immediately upon application for registration. 7 U.S.C. § 136a(c)(1)(C).

The EPA Administrator undertakes a comprehensive review of all pertinent data and determines whether the data is sufficient to satisfy the requirements of FIFRA. 40

C.F.R. § 158.80(a) (1991). To register the pesticide, the EPA must find:

> (a) its composition is such as to warrant the proposed claims for it;
>
> (b) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (c) it will perform its intended function without unreasonable effects on the environment; and
>
> (d) when used in accordance with widespread and commonly-recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). "Unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136b(bb).

The EPA requires a battery of studies, the results of which must be submitted during the application process in order to obtain registration of a pesticide. 40 C.F.R. § 158.20(b). Data submitted by the manufacturer to the EPA includes residual effect data, 40 C.F.R. § 158.240, reentry data, 40 C.F.R. § 158.390, and toxicological data, 40 C.F.R. § 158.340. Based on this and other information, the EPA classifies a pesticide in one of four toxicity categories. 40 C.F.R. § 156.10(h)(1).

Because of the crucial role that product labeling plays in the registration process, the EPA heavily regulates both the design and the content of the label. 40 C.F.R. § 156.10.

The "text" required on the front panel of the label is determined by the Toxicity Category of the pesticide. 40 C.F.R. § 156.10(h)(1). The signal words required ("Danger," "Poison," "Warning" and "Caution") depend upon the toxicity category assigned by the EPA. The EPA, not the manufacturer, determines the appropriate signal word for a given pesticide. The final printed labeling must be submitted and accepted by the Administrator before registration. 40 C.F.R. § 156.10(a)(6).

REASONS THE PETITION SHOULD BE DENIED

I. There is No Split of Authority Warranting Supreme Court Review

There is no split of authority on the preemptive effect of FIFRA among the federal circuit courts of appeal following the opinion of the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992), which is this Court's latest opinion concerning the preemptive effect of federal statutes on common law actions. The *Cipollone* case dealt with the preemptive effect of the Public Health Cigarette Smoking Act of 1969 and the Federal Cigarette Labeling and Advertising Act of 1965. Since that decision, four circuit courts have addressed the FIFRA preemption issue and found that the FIFRA preemption provision preempts all claims based upon failure to warn. These cases are as follows: *Papas v. The Upjohn Company*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); and *King v. E.I. DuPont*

de Nemours & Co., No. 92-2381, 1993 WL 232939 (1st Cir., July 7, 1993).

In addition, only one state court of last resort, the Nevada Supreme Court in the *Davidson* case, has addressed this issue since *Cipollone*, and it also found that FIFRA preempts common law failure to warn claims. In the *Davidson* case, the United States Supreme Court has denied the petition for writ of certiorari. *Davidson v. Velsicol Chemical Corp.*, 834 F.2d 931 (Nev. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1944 (1993).

II. The Opinion of the Eleventh Circuit Finding Preemption was Correct

A. Federal Preemption Standard

Federal preemption of state law is based on the Supremacy Clause of the United States Constitution. The Supremacy Clause provides that "the Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. IV, cl. 2. The Supreme Court has repeatedly explained the principles which govern a claim of federal preemption:

> Federal law may preempt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. E.g., *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96, 103 S. Ct. 2890, 2898-99, 77 L.Ed.2d 490 (1983). Second, even in the absence of express preemptive

> language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. E.g., *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed.2d 581 (1941). *See also Fidelity Federal Sav. & Loan Ass'n, supra*, 458 U.S. at 153, 102 S. Ct. at 3022.

Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Board, 467 U.S. 461, 469 (1984); *accord Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 203-04 (1983).

B. *Cipollone* Mandates a Finding of Express Preemption

1. Pre-*Cipollone* Cases

While the vast majority of courts to consider the issue since FIFRA was amended in 1972 have held that FIFRA preempted state common law claims based upon

failure to warn, they were divided over whether such FIFRA preemption was express or implied.[2] A small minority of courts also clung to the view that FIFRA did not preempt such claims.[3]

2. Analysis of *Cipollone*

The United States Supreme Court recently considered the scope of federal preemption of state tort claims by the cigarette advertising and labeling requirements in the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"), and found that such expressly preempts state common law claims based on failure to warn. *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992). The foundation of the Supreme Court's finding of express preemption is contained in § 5(b) of the 1969 Act, which

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[2] *See, e.g. Papas I, supra; Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[3] *See, e.g. Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984). *Ferebee*, the only U.S. Court of Appeals decision ever to find that FIFRA did not preempt common law failure to warn claims, is nearly a decade old, was never widely followed and now, after *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), discussed *infra*, thoroughly discredited. *See generally Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1139-1141 (E.D.N.Y. 1992) (Weinstein, J.) (Ferebee's notion of a manufacturer's "choice" among paying damages in state tort actions, changing the label, and not selling the product in the state is "artificial"; *Ferebee's* distinction between regulatory and tort law does not survive *Cipollone*.) *See also Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3870 (U.S. June 16, 1993) (No. 92-1989) (observing that analysis in *Ferebee* does not survive *Cipollone*).

is very similar to the preemption provision contained in FIFRA:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2617. The Supreme Court compared the preemption provision in the 1969 Act with its predecessors' preemption provision, § 5(b) of the Federal Cigarette Labeling & Advertising Act, enacted in 1965 ("the 1965 Act"). The 1965 Act's preemption provision states:

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2616.

The Court found that the language in the 1969 Act is much broader than the language in the 1965 Act. 112 S. Ct. at 2619. "First, the latter act [the 1969 Act] bars not simply 'statements' but rather 'requirement[s] or prohibition[s] . . . imposed under State law.' " 112 S. Ct. at 2619. The Court further reasoned that the phrase " '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." 112 S. Ct. at 2620.

The primary distinction drawn between the 1965 and 1969 Acts in *Cipollone* is that the 1965 Act "merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels . . . or in cigarette advertising" and, thus, only prohibited positive enactments. 112 S. Ct. at 2618-19. On the other hand, the 1969 Act prohibits not just "statements" but also "requirements and prohibitions." 112 S. Ct. at 2619. The latter includes positive enactments as well as common law actions. 112 S. Ct. at 2620.

So too, the wording of FIFRA's preemption provision encompasses not just positive enactments but also common law actions. Like the 1969 Act, § 136v(b) uses the term "requirements." In this case, petitioner's failure to adequately warn claims are based on alleged label deficiencies, which suggest that the EPA-approved label inadequately warns users of the hazards of the product. This type of common law claim necessarily includes a jury finding that the EPA-approved label is insufficient because it does not contain certain additional information or warnings. A damages award based on such a jury finding would effectively impose "requirements" on the manufacturer that are different from those imposed by FIFRA. It cannot be argued but that a State is prohibited from imposing such requirements. It logically follows that a jury determination with the same effect is also forbidden by FIFRA. Since petitioner's negligence and strict liability claims for failure to warn, as pled, impose "requirements" in addition to or different from those required by FIFRA, those claims are expressly preempted.

3. A Jury Verdict is Equivalent to State Regulation

The Supreme Court has consistently acknowledged the regulatory impact of common law tort actions. In *Cipollone*, the Court stated: " '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " 112 S. Ct. at 2620, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

In *Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1980), plaintiff, a brick manufacturer, brought a lawsuit in Iowa state court against defendant, a railroad. Plaintiff sought damages under Iowa statutory and common law for defendant's allegedly wrongful abandonment of the rail line which served plaintiff's factory. However, defendant had sought and received the permission of the Interstate Commerce Commission to abandon the line. The Iowa Court of Appeals held that plaintiff's suit was not preempted by the Interstate Commerce Act. The United States Supreme Court unanimously reversed.

The Court first held that the Interstate Commerce Act provides the ICC with exclusive power to allow or disallow a railroad to abandon a line. 450 U.S. at 320. It then held that Iowa law, as manifested through plaintiff's suit, was in conflict with the federal law. The Court explained that it would be clearly inconsistent with Congressional intent to allow a state "to use the threat of damages to require a carrier to do exactly what the Commission is

empowered to excuse." 450 U.S. at 326. Thus, the Court understood that the specter of civil damages is clearly a means by which the state may seek to impose its regulatory wishes. *See also International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (nuisance suit seeking damages and injunction against water polluter preempted by Clean Water Act); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (suit for damages based on California common law doctrine restricting enforcement of "due on sale" clauses in home mortgage loans preempted by federal regulation allowing enforcement of such a clause).

4. Cases Decided After *Cipollone*

As stated previously, every federal circuit opinion decided after *Cipollone* has found that FIFRA preempts failure to warn actions. In *Papas I*, the Eleventh Circuit found that FIFRA impliedly preempts state common law actions based on inadequate labeling allegations. The Tenth Circuit found likewise in *Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) ("*Arkansas-Platte I*"). After its decision in *Cipollone*, the Supreme Court vacated and remanded both *Papas I* and *Arkansas-Platte I*, "for further consideration in light of *Cipollone*." *Papas v. Zoecon Corp.*, ___ U.S. ___, 112 S. Ct. 3020 (1992) and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, ___ U.S. ___, 113 S. Ct. 314 (1992). Following remand, the Eleventh and Tenth Circuits found that FIFRA expressly preempts state common law failure to warn claims. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*") and *Arkansas-Platte & Gulf*

Partnership v. Van Waters and Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*").

In *Papas II*, the Eleventh Circuit concluded that "the *Cipollone* opinion dictates, under an express preemption analysis, the same result we reached earlier under the implied preemption doctrine." *Papas II*, 985 F.2d at 518. The court further stated:

> The Papases concede that each of their negligence, strict liability, and breach of implied warranty counts alleges in part that Zoecon failed to warn users that its products contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. . . . Thus, to the extent the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated warnings, those claims are preempted."

Id., citing *Cipollone*, 112 S. Ct. at 2621-22.

The Tenth Circuit similarly concluded that "to the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Arkansas Platte II*, 981 F.2d at 1179. "Indeed, our conclusion is reinforced because the labeling provision of § 136v(b) is as inclusive as that

contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims." *Id.* at 1179, citing *Cipollone*, 112 S. Ct. at 2621-22.

The First and Seventh Circuits have joined the Tenth and Eleventh Circuits in holding that FIFRA expressly preempts state law failure to warn claims. *King v. E. I. DuPont de Nemours & Co.*, No. 92-2381, 1993 WL 232939 (1st Cir. July 7, 1993) and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). Like the courts in *Papas II* and *Arkansas Platte II*, the *King* and *Shaw* courts concluded that its analysis of FIFRA preemption was controlled by *Cipollone*. As stated in the *Shaw* case, "If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA." *Shaw*, 994 F.2d at 371.

At least eleven other cases have been decided since the *Cipollone* decision as follows: *Kolich v. Sysco Corp.*, 1993 WL 249093 (D. Kan. June 8, 1993); *Casper v. E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903 (E.D. Wash. 1992); *Gibson v. Dow Chemical Co.*, No. 92-30 (E.D. Ky. Oct. 19, 1992); *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992); *Burke v. Dow Chemical Co.*, 759 F. Supp. 1128 (E.D.N.Y. 1992); *MacDonald v. Monsanto Co.*, No. 1:91CV162, 1993 WL 49898 (E.D. Tex. Feb. 25, 1993); *Burge v. Jones*, No. B-92-022, 1992 WL 415263 (S.D. Tx. Nov. 18, 1992); *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1944 (1993); *Brennan v. Dow Chemical Co.*, 613 So.2d 131 (Fla. Dist. Ct. App. 1993); and *Yowell v. Chevron Chemical Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992). The courts in nine of

the eleven cases hold that FIFRA preempts state common law failure to warn claims. The courts in *Kolich, Casper, Gibson, Burge, Davidson, Brennan* and *Yowell* held that the defendant pesticide manufacturers were entitled to summary judgment. Although the court in *Burke* declined to grant summary judgment, it did acknowledge that "[u]nder the preceding express preemption analysis, however, defendants are entitled to some preemption protection, the precise extent of which need not be determined before completion of discovery." *Burke*, 797 F. Supp. at 1141. Only *Couture* and *MacDonald* held that FIFRA neither expressly nor impliedly preempts failure to warn claim, and *MacDonald* has been appealed to the Fifth Circuit, which has already stated that the *Ferebee* case's rationale did not survive *Cipollone*. *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3837 (U.S. June 16, 1993) (No. 92-1989).

CONCLUSION

This Court's decision in *Cipollone* dictates the federal preemption analysis for failure to warn claims. The courts have had little difficulty in applying the law set out in that opinion to find that FIFRA likewise preempts failure to warn actions, such as those involved in this case. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES L. MOORE
J. GREG DOW
HOLTZMAN & URQUHART
900 Two Houston Center
909 Fannin Street
Houston, Texas 77010
(713) 739-0000

Attorneys for Respondent,
Mobay Corporation